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No. 93-2073

In the Supreme Court of the United States

OCTOBER TERM, 1994

FRANCIS J. DASHNAW, PETITIONER

v.

FEDERICO PEÑA, SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below erred in refusing, for purposes of calculating a backpay award, to assume that petitioner would have been promoted to a GS-16 position.

2. Whether the court of appeals erred in concluding that there was insufficient evidence in the record to support petitioner's claim of constructive discharge.

3. Whether the court of appeals, having concluded that petitioner was not constructively discharged, erred in failing to consider whether the motive for the alleged constructive discharge was retaliation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. a1-a8) is reported at 12 F.3d 1112. The opinion (Pet. App. 9a-74a) and orders of the district court (Pet. App. 75a-87a, 88a-91a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1994. A petition for rehearing was denied on March 29, 1994. Pet. App. 106a, 107a. The petition for a writ of certiorari was filed on June 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was hired by the Federal Maritime Administration (MARAD) in 1967 as a GS-14 engineer. Pet. App. a3. In 1977, petitioner filed a complaint in district court alleging employment discrimination on the basis of age, national origin, religion and race. By the time of trial, petitioner's only allegation was that he had been discriminated against on the basis of his age, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a. His main allegation was that he had been denied promotions to GS-15 positions that went instead to younger candidates. Pet. App. a3.

The district court conducted a bench trial from April 21, 1980, through May 1, 1980. Pet. App. a3. In July, 1982, before any judgment had been issued, petitioner filed a document entitled "Notice of Change in Plaintiff's Employment Status," which stated as follows:

> [Petitioner] hereby notifies the Court that the position held by [petitioner] at the Maritime Administration was abolished in April, 1982, under reduction in force (RIF) procedure. [Petitioner] declined another job offer, resigned and has applied for discontinued service retirement. He is currently unemployed. Since this matter was tried in April, 1980, and has been pending decision since June of 1980, [petitioner] respectfully requests that the Court expedite decision in this matter and render a decision within the next thirty (30) days.

Id. at a3-a4. Over the next three years, petitioner filed four additional requests for expedited consideration and two motions for status calls. *Id.* at a4. These motions did not allege that petitioner had been constructively discharged, nor did they mention the circumstances of

his retirement. *Ibid.* Petitioner never amended his complaint to include an allegation of constructive discharge.

In July, 1985, the district court ordered that petitioner be promoted to the GS-15 level, retroactive to an unspecified date, and that he receive backpay. Pet. App. a4. The memorandum opinion accompanying the order did not address petitioner's 1982 retirement. Respondent moved to amend the judgment on the ground that the opinion referred to materials not admitted into evidence. *Ibid.* The trial court granted the motion in June, 1986, vacating the July, 1985, judgment. *Ibid.*

On August 19, 1986, petitioner filed a two-page motion again requesting expedited consideration of his case. This motion did not use the words "constructive discharge," but did state that "[petitioner] submits that his retirement in the face of being offered a position with no description or duties was in effect involuntary and would not have occurred if he had not been discriminated against with respect to promotions in the 1970s." Pet. App. a4.

In April, 1988, the district court issued an opinion finding that petitioner had been discriminated against on the basis of his age on four occasions on which he was denied promotions. Pet. App. 9a-74a. The district court's findings made no reference to any constructive discharge, and the opinion did not include an order. The district court invited petitioner to propose a remedial order. *Id.* at 74a. Petitioner recommended that he be reinstated with backpay from 1982. *Id.* at a5. Both sides then filed affidavits and exhibits concerning the circumstances of petitioner's departure from MARAD. *Ibid.*

On September 11, 1989, the district court issued a memorandum order finding that petitioner was entitled to a retroactive promotion to the GS-15 level, effective

two years before the date on which he filed his first administrative complaint. Pet. App. a5, 77a. The memorandum also upheld petitioner's constructive discharge claim, rejecting respondent's contention that, when it eliminated petitioner's job in 1982, it offered petitioner an alternative job from which he was likely to attain the promotion to GS-15 that he had long sought. *Id.* at a5, 81a-82a. The district court found that petitioner was constructively discharged because a "reasonable person would have concluded that those working conditions were intolerable." *Id.* at 83a.

On May 11, 1992, the district court issued an order directing that petitioner be retroactively promoted to the GS-15 level, and that he receive backpay from 1975 through the date of the order, subject to appropriate mitigation as determined by the parties' subsequent discovery. Pet. App. a5, 89a-91a. Because the court found that petitioner had been constructively discharged in 1982, its backpay award included the years after petitioner left MARAD's employ. *Id.* at a5.

2. Respondent appealed, challenging only the district court's ruling that petitioner was constructively discharged in 1982. Petitioner cross-appealed, arguing that he should have been promoted to the GS-16 level rather than GS-15. The court of appeals reversed the district court's finding of constructive discharge, affirmed the judgment in all other respects, and remanded the case to the district court for calculation of the amount owed petitioner. Pet. App. a8.

The court of appeals observed that the "law of the circuit makes clear that, in order to find a constructive discharge in a case involving a claim of discrimination, a District Court must find not only intentional discrimination, but also 'aggravating factors.'" Pet. App. a7. The court noted that "the District Court found no

aggravating factors at all, but simply relied on its finding that MARAD had discriminatorily failed to promote [petitioner] as support for its conclusion that the agency had made [petitioner's] working conditions 'intolerable.'" *Ibid.* The court then concluded that the district court's findings "plainly cannot support a conclusion that [petitioner] was constructively discharged" and, further, that "the record is insufficient to support a constructive discharge claim." *Ibid.* Accordingly, the court held that petitioner "is not entitled to reinstatement or to backpay for the period following his departure from MARAD." *Ibid.*

The court then rejected petitioner's argument that the district court should have calculated the backpay award assuming that petitioner would have been promoted to a GS-16 position. Noting that the district court had found that petitioner's promotion to GS-16 was "subject to speculation," the appellate court concluded that "[n]othing in the record persuades us that this finding is clearly erroneous, and we accordingly uphold it." Pet. App. a7.

ARGUMENT

1. Petitioner renews his argument (Pet. 23-24) that the district court erred in refusing to order his promotion to the GS-16 level. That contention is without merit. The district court, "[a]fter giving careful consideration" to petitioner's assertions, found that "[w]hether [petitioner] would have been promoted to a Grade 16 is subject to speculation," because any promotion to GS-16 would have required the approval of the Office of Personnel Management. Pet. App. 84a. The court of appeals affirmed this finding as not clearly erroneous. *Id.* at a7. This Court ordinarily will not reverse factual findings concurred in by both lower

courts, see *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); *Graver Tank & Mfg.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949), and petitioner offers no reason for the Court to depart from that practice in this case.

Petitioner contends (Pet. 24) that the decision below conflicts with *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), and *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). In *Franks* and *Albemarle*, the Court emphasized that one of the central purposes of Title VII of the Civil Rights Act of 1964 (on which some of the remedial provisions of the ADEA are modeled) is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Franks*, 424 U.S. at 763; *Albemarle*, 422 U.S. at 418. In neither case, however, did the Court state that Title VII requires an employment-discrimination plaintiff to be placed in a better position than he or she would have been in, had the discrimination not occurred. Here, the district court awarded backpay as a result of its finding that petitioner would have been promoted from GS-14 to GS-15 but for the age discrimination, but it declined to assume a further promotion to a GS-16, finding such a promotion speculative. That finding was based on the facts and circumstances of this particular case and is consistent with *Albemarle* and *Franks*.

2. Petitioner argues (Pet. 25-43) that, in analyzing his constructive discharge claim, the court of appeals erred by requiring him to show that "aggravating factors" compelled him to resign, and that there is a conflict among the circuits on this issue. There is, however, no conflict among the courts of appeals; five other circuits have expressly agreed with the D.C. Circuit's decision below that, to prevail on a claim of constructive discharge, an employment-discrimination plaintiff must show "aggravating factors" beyond the fact of discrim-

ination itself.[1] Moreover, every circuit has adopted essentially the same test for constructive discharge claims, which requires plaintiffs to show that their working conditions were so bad that a reasonable person in the employee's shoes would have felt compelled to resign.[2] While the courts of appeals may have used different terms, such as "intolerable," "unpleasant," or

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[1] See *Pittman* v. *Hattiesburg Mun. Separate School Dist.*, 644 F.2d 1071, 1077 (5th Cir. 1981) (Title VII); *Yates* v. *Avco Corp.*, 819 F.2d 630, 636-637 (6th Cir. 1987) (Title VII); *Darnell* v. *Target Stores*, 16 F.3d 174, 177 (7th Cir. 1994) (ADEA); *Nolan* v. *Cleland*, 686 F.2d 806, 813 (9th Cir. 1982) (Title VII); *James* v. *Sears, Roebuck & Co.*, 21 F.3d 989, 992 (10th Cir. 1994) (ADEA). While the Third Circuit has disapproved the suggestion that "constructive discharge *necessarily* requires evidence of aggravating circumstances" beyond an incident of discrimination, see *Schafer* v. *Board of Public Education*, 903 F.2d 243, 250 (1990) (emphasis added), under the reasoning that even one incident of discrimination could be so intolerable as to compel a reasonable person to quit, it, like every other circuit, has required constructive discharge plaintiffs to show that working conditions were so bad as to compel a reasonable person to resign. *Ibid.* As far as we are aware, no circuit has interpreted the "aggravating circumstances" requirement to involve more than that.

[2] *Aviles-Martinez* v. *Monroig*, 963 F.2d 2, 6 (1st Cir. 1992) (42 U.S.C. 1983); *Stetson* v. *NYNEX Serv. Co.*, 995 F.2d 355, 361 (2d Cir. 1993) (ADEA); *Clowes* v. *Allegheny Valley Hosp.*, 991 F.2d 1159, 1161 (3d Cir.) (ADEA), cert. denied, 114 S. Ct. 441 (1993); *Bristow* v. *Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985) (ADEA), cert. denied, 475 U.S. 1082 (1986); *McKethan* v. *Texas Farm Bureau*, 996 F.2d 734 (5th Cir. 1993) (ADEA), cert. denied, 114 S. Ct. 694 (1994); *Yates* v. *Avco Corp.*, 819 F.2d at 636-637; *Darnell* v. *Target Stores*, 16 F.3d at 177; *Hukkanen* v. *International Union of Operating Eng'rs*, 3 F.3d 281, 284 (8th Cir. 1993) (Title VII); *Steiner* v. *Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994) (Title VII); *James* v. *Sears, Roebuck & Co.*, 21 F.3d at 992; *Wilson* v. *S & L Acquisition Co.*, 940 F.2d 1429, 1436 (11th Cir. 1991) (ADEA).

"aggravating," to describe how bad the working conditions must be for a finding of constructive discharge, they all undertake the same inquiry and require essentially the same showing.[3] This unanimous view is consistent with the policy of federal fair-employment laws that, where possible, claims of unlawful discrimination should be addressed within the context of ongoing employment relationships. See *Bourque* v. *Powell Elec. Mfg.*, 617 F.2d 61, 66 (5th Cir. 1980). A civil rights plaintiff must, therefore, "mitigate damages by remaining on the job" unless that job presents "such an aggravated situation that a reasonable employee would be forced to resign." *Ibid.*

3. Finally, petitioner argues (Pet. 43-46) that the court of appeals erred in failing to consider whether respondent's motive for the constructive discharge was retaliation. The court of appeals did not need to address this issue, however, because it found that there had not been a constructive discharge. The crucial question in petitioner's constructive discharge claim was whether a reasonable person in petitioner's position would have felt compelled to quit because of intolerable working conditions. The court of appeals answered that question in

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[3] The Fourth Circuit may have adopted an anomalous (and stricter) requirement that, in constructive discharge cases, the plaintiff must also show that the employer created the working conditions with the intent to force the plaintiff's resignation. See *Bristow*, 770 F.2d at 1255. In *Johnson* v. *Shalala*, 991 F.2d 126 (4th Cir. 1993), cert. denied, No. 93-248 (Oct. 3, 1994), which involved a constructive discharge claim under the Rehabilitation Act, 29 U.S.C. 701 *et seq.*, the petitioner challenged the Fourth Circuit's intent requirement. This case does not present that question, for the court of appeals did not require petitioner to show that respondent intended to force him to quit.

the negative, and the retaliatory motive issue thus became irrelevant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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